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## Quotas for men in University: breaking the stereotype in European Union law and Swedish law

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### Resumo:

A tese retrata o tema das quotas para o sexo sub-representado no ensino superior. O tema central é jurídico mas também inclui uma perspectiva sociológica. A primeira parte da investigação aborda a questão da igualdade de género no ensino superior na perspectiva dos direitos humanos. A segunda parte da tese adopta uma visão da mesma questão do ponto de vista do direito da União Europeia. A terceira parte do estudo usa como exemplo a Suécia e a experiência nacional relativamente às quotas de género no ensino superior, a fim de demonstrar os resultados da aplicação destas medidas. Na sua conclusão, a tese levanta a questão da “categorização de género” em relação aos homens na sociedade actual, e relaciona este conceito à tendência generalizada para o seu insucesso a nível académico, com o objectivo de eliminar a visão estereotipada de que os homens não são considerados um “grupo vulnerável” na área do ensino superior. Em última análise, pretende-se averiguar se os homens estão a ser discriminados, pelo direito e pela sociedade, no que diz respeito às suas oportunidades educativas.

### Palavras-chave:

Quotas, discriminação, homens, universidade, género, igualdade

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## Introdução

*The admissibility of quotas for the under-represented sex in university*

The purpose of this text is to approach the issue of quotas for the under-represented sex in university. This will be a primarily legal analysis, but sociological perspectives will also be included in order to render the reader a more comprehensive view of the question at stake.

This text will question the de facto application of the principle of gender equality, taking the Swedish experience regarding quotas for the under-represented sex in higher education as an example. In some university degrees in Sweden men are the under-represented sex, instead of women. Men appear to be falling behind in relation to women at the moment of entering certain degrees. This situation is also occurring in other countries in

Europe. Therefore, this thesis will look into situations regarding quotas in higher education in Sweden, as well as comparable cases regarding quotas under European law, mostly in the area of the labour market. This analogy will be carried out in order to establish a parallel regarding quotas for the under-represented sex in these two areas, in relation to issues regarding individual merits and gender balance, within the scope of the application of quota systems. As one of the objectives of this thesis is to attempt to ascertain the admissibility and lawfulness of the application of this type of quotas in practice, Swedish court cases on the matter will also be addressed.

An International Human Rights perspective will also be included, more specifically in what concerns the right to education, in order to approach the issue of quotas for the under-represented sex in the Swedish education system and to understand how their application in higher education admissions has resulted in gender imbalance. By approaching the perspective of human rights, this thesis will attempt to answer whether or not men are being discriminated on the grounds of sex, within the scope of their right to higher education, due to the incorrect application of quota systems by universities in Sweden.

The specific issue of indirect discrimination under European anti-discrimination law will also be analysed. For this purpose, an analogy between situations where women were considered to be indirectly discriminated in situations involving quotas for the under-represented sex within the European context will also be carried out. The current situation for men as an under-represented group in higher education in Sweden will then be compared to the above mentioned situation of women, in order to determine whether or not men are being as protected as women under EU law.

In its conclusion, this thesis will also raise the issue of the 'gendering' of men in today's societies, and attempt to relate it to the existing trend for their underachievement on an academic level, with the purpose of contributing to break what can be considered a stereotypical view that does not see men as a 'vulnerable group' in the area of higher education. Ultimately, this thesis will attempt to answer whether or not men are being discriminated by the law and by society, where their educational opportunities are concerned.

## **2. Gender equality**

The trend that will be approached in this thesis regards men in European Union (EU) countries. EU statistics, referred to in this thesis, show that men are underachieving on an academic level in some university degrees and are accessing higher education in progressively fewer numbers. The referred data shows that there is a growing gender imbalance in areas such as medicine and law, as well as in some science subjects.

For the purposes of this thesis, the concepts that will be used are based on the terminology from a perspective of European law, namely, on definitions given by the European Commission.

Thus, the concept of 'quota' will be understood as: 'a proportion or share of places, seats or resources to be filled by, or allocated, to a specific group, generally under certain rules or criteria, and aimed at correcting a previous imbalance, usually in decision-making

positions or in access to training opportunities or jobs' (European Commission, 1998: 46). Therefore, when the concept of 'quota' is referred to in this thesis, it will be from a gender perspective, regarding quotas specifically for the under-represented sex, not only in the area of employment but also in the area of education. Any other type of quota, such as the so-called 'ethnic quotas' in higher education, will be expressly distinguished from the concept of quotas for the under-represented sex, where deemed necessary. Moreover, 'quota systems' will be understood as a form of preferential treatment, that is defined below as a type of 'positive action' or 'affirmative action'. These latter concepts will also be defined in this section.

As the above mentioned concept of 'quotas' will be directly connected with the concepts of sex (or gender) discrimination, the concept of 'sex' is to be understood as the 'set of biological characteristics which distinguish human beings as female or male' (European Commission, 1998: 50). On the other hand, 'gender' is to be understood as a concept that refers to 'the social differences, as opposed to the biological ones, between women and men' (European Commission, 1998: 25). As for the term 'social differences' in relation to the concept of gender, it is to be interpreted as an array of differences that are considered to have been learned, that may vary through time, as well as within and between cultures (European Commission, 1998: 25). Nevertheless, for the purposes of this thesis, the terms 'sex' and 'gender' will be used alternately.

Thus, the concept of 'sex discrimination' is also essential for an introduction to the terms that will deal with gender equality. It may occur in a direct or in an indirect form. Direct discrimination will be understood as occurring when 'a person is treated less favourably because of his or her sex' (European Commission, 1998: 51). While indirect discrimination will be understood as concerning situations 'where a law, regulation, policy or practice, which is apparently neutral, has a disproportionate adverse impact on the members of one sex, unless the difference in treatment can be justified by objective factors' (European Commission, 1998: 51).

On the other hand, within the context of sex discrimination, *de iure* discrimination will also be worded as discrimination 'in law', while *de facto* discrimination will also be worded as discrimination 'in fact'.

Hereinafter, the concept of 'gender discrimination' will be used alternately to the concept of 'sex discrimination', even though the former concept is broader. The concept of 'gender discrimination' includes more than just discrimination with regard to sex as a set of biological characteristics, but also includes discrimination towards 'what is considered to be male or female behaviour' (Lerwall, 2001: 430).

As for the concept of 'gender equality', it is henceforth to be understood in this sense 'all human beings are free to develop their personal abilities and make choices without the limitations set by strict gender roles' (European Commission, 1998: 28). As a consequence, equal consideration, favour and value is to be given to the needs, aspirations and behaviour of men and women alike (European Commission, 1998: 28). Gender equality can be seen from a formal or a substantial perspective. According to the formal conception of gender equality, equal situations must be treated equally, while unequal situations must be treated differently (Lerwall, 2001: 429). Thus, this formal concept leaves no room for positive

action measures (these measures will be defined below). On the other hand, substantive or de facto equality is to be understood as involving not only the idea of formal equal treatment but also comprises equal results in practice (Lerwall, 2001: 429). So, unlike formal equality, de facto equality does give leeway to treating apparently equal situations differently or considering that unequal situations should be treated in the same manner, thus allowing differential treatment (Lerwall, 2001: 429).

The terms 'positive action' or 'affirmative action', 'preferential treatment' or 'differential treatment', as well as 'temporary special measures' are also to be understood as synonyms for the purposes of this thesis, whether the concepts are used in an international (International Human Rights Law), regional (European Union Law) or national (Swedish legislation) context.

Therefore, these terms are to be understood as a 'group of measures targeted at a particular group and intended to eliminate and prevent discrimination or to offset disadvantages arising from existing attitudes, behaviours and structures' (European Commission, 1998: 11). Nonetheless, the concept of 'preferential treatment' is not exactly synonymous to the concept of positive action. It is somewhat 'narrower' (Lerwall, 2001: 435). It is defined as 'the treatment of one individual or group of individuals in a manner which is likely to lead to better benefits, access, rights, opportunities or status than those of another individual or group of individuals.' (European Commission, 1998: 45). Moreover, 'It may be used positively when it implies a positive action intended to eliminate previous discriminatory practice or negatively where it is intended to maintain differentials or advantages of one individual or group of individuals over another.' (European Commission, 1998: 45). In other words, preferential treatment 'refers to a specific kind of action and is a special form of affirmative action' (Lerwall, 2001: 435). Positive action is broader, as it involves 'any action promoting equality' (Lerwall, 2001: 435). Nevertheless, for the purposes of this thesis, this term will also be used as alternate to the term 'preferential treatment'.

As for the concept of formal equality, it is to be understood for the purposes of this thesis as related to the principle of non-discrimination on the grounds of sex (Lerwall, 2001: 429). In this sense, positive action will be understood as involving situations that will represent an exception to formal equality, as certain situations justify differential treatment of men and women based on their sex (Lerwall, 2001: 434). Therefore, measures of positive action will also be considered as exceptions to the principle of non-discrimination on the grounds of sex (Lerwall, 2001: 435). In other words, whether it is from a national, regional or international perspective, positive action measures will involve those cases where treating equal situations differently or considering unequal situations equally is accepted as reasonable, because it is considered to be a means of promoting equal results in practice (de facto equality) (Lerwall, 2001: 431).

Finally, the concept of 'gender mainstreaming' is to be understood according to the definition given by the European Commission as 'the systematic integration of the respective situations, priorities and needs of women and men in all policies.' (European Commission, 1998: 45). In this same definition, the concept 'views to promote equality between women and men and to mobilise all general policies and measures specifically for the purpose of achieving equality' (European Commission, 1998: 45). These objectives are to

be carried out 'by actively and openly taking into account, at the planning stage, their effects on the respective situations of women and men in implementation, monitoring and evaluation' (European Commission, 1998: 45). This concept is relevant for the purposes of this thesis in order to point out that, according to the 'Recast Directive' (Directive 2006/54/EC, 2006: 23), the obligation of the EU and its Member States for positive action measures can be considered as part of the obligation of gender mainstreaming, to be actively taken into account within the objective of equality between men and women, in the formulation and implementation of laws, policies and activities.

### **3. On a national level: gender quotas in higher education in Sweden**

#### *3.1. Quota systems for gender balance in higher education in Sweden*

Within the scope of the Gender Equality Policy, the Swedish government appointed a committee in February of 2009 to promote gender equality in higher education. It focused particularly on the fight against gender-based subject choices, as well as on reversing the tendency towards fewer male students in higher education. It also addressed gender differences in terms of study and drop out rates of males and females, as well as the propensity of both sexes to complete a degree. Career opportunities in research and the representation of both sexes at an executive level in higher education were also the object of the attention of the committee (Ministry of Integration and Gender Equality, 2009: 3).

The previous Swedish Higher Education Ordinance 1993:100 (Ministry of Education and Research, 1993) referred to gender equality in section 8 of chapter 1. This section stated that, according to chapter 1, section 5 of the previous Higher Education Act (Swedish National Agency for Higher Education, 2010) equality between men and women should always be observed and promoted in the activities of institutions of higher education. The need for the equal treatment of students and applicants to such institutions, irrespective of gender, ethnic origin, sexual orientation or disability was also pointed out in section 9 of chapter 1 of the above mentioned Ordinance. This need was not neglected by the Equal Treatment of Students at Universities Act (Ministry of Education and Research, 2007), before it was abolished and included in the Discrimination Act (Government Offices of Sweden, 2008).

The purpose of the Equal Treatment of Students at Universities Act (also known as The Equal Treatment Act) was to promote equal rights for students and applicants, as well as to fight discrimination in the higher education sector. This Act expressly stated, in section 7, that:

A university may not disfavour a student or an applicant by treating him or her worse than the university treats, has treated or would have treated someone else in a comparable situation, if the disfavour is connected with sex, ethnic belonging, religion or other religious faith, sexual orientation or disability (Ministry of Education and Research, 2007).

Most importantly, however, the rule added an exception to the prohibition of discrimination, that expressly determined that 'The prohibition does not apply if the treatment is justified taking into account a special interest that is manifestly more important than the interest of preventing discrimination at the university.' (Ministry of Education and

Research, 2007). In other words, this rule opens the possibility for positive action measures, such as quota systems in the admissions procedures to higher education, as long as this treatment is justified by a 'special interest', to be considered of greater importance than the purpose of preventing discrimination.

In conclusion, differential treatment on the grounds of sex in higher education was seen as one of the exceptions to the principle of the prohibition of discrimination within the scope of the Equal Treatment of Students at Universities Act, before it was abolished by the current Discrimination Act, that is less detailed regarding these particular issues. Therefore, it seems that the issue of gender equality in university admissions procedures has been subject to a more 'closed' wording in the Discrimination Act, in comparison to the more 'open' and detailed wording given to the exceptions to the prohibition of discrimination based on gender of the previous Equal Treatment of Students at Universities Act. In other words, the Discrimination Act shows a more restrictive approach to the possibility of positive action measures such as quotas.

This alteration is an evident contradiction in light of the growing gender imbalance in certain higher education degrees in Sweden, where the under-represented sex is men (Ministry of Integration and Gender Equality, 2009: 3). According to the Ministry of Integration and Gender Equality, in order to promote equality in higher education, the focus should not only be on combating gender-based subject choices but also on reversing what the government considers to be a trend towards fewer male students in the sector (Ministry of Integration and Gender Equality, 2009: 3). So, in practice, the alteration in the wording of the Discrimination Act has clear implications in the possibility for positive action measures in the name of gender balance, where the entrance procedures to higher education are concerned, namely, in the protection of the under-represented sex through quota-systems.

In 2008, the CEDAW Committee, in its concluding observations regarding Sweden, (UN CEDAW Committee, 2008), considered that it should strengthen its efforts to encourage and increase the number of women in high-ranking posts, particularly in academia. For this purpose, it recommended the adoption of measures to encourage more women to apply for these kinds of jobs. The observations urged the Swedish State to undertake temporary special measures in order to accelerate the realization of women's de facto equality with men. More specifically, the committee also recommended that Sweden included temporary special measures such as goals and quotas in its gender equality legislation, enhanced by a system of incentives, in both the public and private sectors (UN CEDAW Committee, 2008: 4 [25]). In what concerned the special interests of men, the committee only focused on parental leave by stating that:

The Committee recommends that the State party continue its efforts to ensure reconciliation of family and professional responsibilities and for the promotion of equal sharing of domestic and family tasks between women and men, including by increasing the incentives for men to use their right to parental leave (UN CEDAW Committee, 2008: 4-5 [27]).

Therefore, there is no particular emphasis in these observations on the needs of men in the area of higher education, namely in admissions procedures. There is also no direct

reference to men as a group in need of protection in the above mentioned Gender Equality Policy. The government only refers that:

Gender mainstreaming means that decisions in all policy areas are to be permeated by a gender equality perspective. Since everyday decisions, the allocation of resources and the establishing of standards all affect gender equality, a gender perspective must be an integral part of day-to-day activities. The strategy has been developed as a means of combating the tendency to neglect gender equality issues or to consider them secondary to other political issues and activities (Ministry of Integration and Gender Equality, 2009: 3).

However, the Swedish government does not appear to be adopting this strategy, as it seems to have neglected gender balance in university admissions procedures, in what concerns the special needs of men as the under-represented sex. Moreover, the government seems to have considered this issue secondary to other political issues and activities, as the element of gender balance in higher education was excluded with the amendment of the Higher Education Ordinance.

Swedish universities had been given autonomy by the Swedish government to implement quota systems for the under-represented sex in order to provide gender balance within certain higher education degrees (The European Directory of Women and ICT, 2010). However, some members of government, namely Sweden's previous Minister for Higher Education and Research Tobias Krantz, considered that quota systems based on gender did not produce positive practical results (The European Directory of Women and ICT, 2010). As an example of these negative results, one may consider the case of Swedish University of Agricultural Sciences (Swedish Court of Appeal, 2009: T-3552-09). This case, as well as a case regarding ethnic quotas of the Uppsala Faculty of Law (Supreme Court of Sweden, 2006: T 400-06) both led to imbalanced results due to the application of quota systems. These cases will be further developed in this thesis, as they can be considered to have motivated the Swedish government's decision to disallow the use of gender quotas in university entry procedures, as well as the consequent *amendment of the Swedish Higher Education Ordinance*.

The amended version of the Ordinance 2010:2020 (Swedish National Agency for Higher Education, 2010) no longer includes the references to gender of its previous version (Ministry of Education and Research, 1993), regarding the provisions for equal treatment of students in admissions procedures. Section 9 of chapter 1 of the previous Ordinance made direct reference to section 7 of the Equal Treatment of Students at Universities Act (Ministry of Education and Research, 2007). This Act allowed for an exception to the prohibition of direct discrimination when a more favourable treatment of students was justified due to a special interest, that was required to be manifestly more important than the interest of preventing discrimination at university. The exception could be made on the grounds of sex, ethnic belonging, or other factors. However, section 9 of chapter 1 of the previous Ordinance was repealed by the new, amended Higher Education Ordinance, whereby this possibility of favourable treatment based on gender has ceased to apply (Swedish National Agency for Higher Education, 2010).

*Up until the time of this amendment, it was considered lawful for universities to apply gender quota systems for the under-represented sex in their admissions procedures*

*(on the condition that all other factors between a potential male and female candidate were equal).* However, with this alteration, from the second semester of 2011 on, the possibility for admissions to take gender into account will no longer be applicable as a measure for equal treatment, including measures of positive action through quota systems.

Sweden had already disallowed the exceptional use of quotas based on ethnicity in 2006, regarding applicants with lower qualifications (The European Directory of Women and ICT, 2010). Coincidentally, it was in 2006 that the aforementioned ethnic quota court case involving the Uppsala Law Faculty took place (Supreme Court of Sweden, 2006: T 400-06). The Law Faculty had a quota system whereby 10 percent of seats were reserved for students with both parents of foreign origin, whose qualifications were inferior to the majority of the applicants for this degree. Two students of Swedish origin considered that they had been discriminated due to their ethnic origin. They took their case to the Supreme Court because they were denied the possibility of entering the law degree due to this 'ethnic quota', which was applied favourably for students who did not have equal merits to their Swedish counterparts. The above mentioned exception to the prohibition of discrimination of section 7 of the Equal Treatment of Students at Universities Act was at stake in this case (Ministry of Education and Research, 2007), whereby universities were allowed to disregard this prohibition if there was a justified special interest that was manifestly more important than the interest of preventing discrimination at university (paragraph 2 of section 7). The question in this case was whether or not this exception permitted the application of a quota system for admissions. The court ruled that, in this case, 10 percent of the seats could not be used for applicants of a specific ethnic origin.

Since 2006 there has been the progressive prohibition of the use of quotas based on ethnicity and gender when granting admission to higher education institutions (The European Directory of Women and ICT, 2010). Even though a number of universities in Sweden made use of the provision of the Higher Education Ordinance regarding gender in admissions, the way the provision was applied varied from institution to institution (The European Directory of Women and ICT, 2010). The practical result of the application of these quota systems caused this type of preferential treatment to especially benefit male students in medicine, dentistry, psychology and law (The European Directory of Women and ICT, 2010). Among the universities that incorporated preferential treatment based on gender in their admissions processes, the veterinary program of the Swedish University of Agricultural Sciences is emblematic because in this case (as in others in Sweden), there were 'gender-biased competition' complaints by a majority of female applicants (The European Directory of Women and ICT, 2010). These measures, instead of just especially benefiting men, also resulted in women being left on the reserve list to admissions. Therefore, in this case, instead of counteracting gender imbalance, the gender quota system resulted in gender discrimination towards women, who were left out due to what can be considered to be an unlawful application of quotas in order to protect the under-represented sex.

On the other hand, the Office of the Swedish Equality Ombudsman (now the Discrimination Ombudsman or DO) did not agree with the Swedish government's decision regarding the elimination of the provision allowing the use of preferential treatment on the grounds of sex from the admissions procedures to higher education (The European Directory



of Women and ICT, 2010). Along with several consultative bodies, the DO advised against amending the regulations. The Ombudsman also criticized the fact that the regulatory change at stake was not sufficiently scrutinized prior to the decision of excluding gender as a criterion in the admissions to university (The European Directory of Women and ICT, 2010). According to the DO, the fact that some particular schemes of preferential treatment did not achieve the intended results does not mean that all types of positive action based on gender should be disregarded when granting admission to studies. In other words, even though the sued institutions acted unlawfully, it is wrong to totally eliminate the option of employing preferential treatment on the basis of the above mentioned court cases (The European Directory of Women and ICT, 2010). According to the Ombudsman, promoting gender equality in the higher education sector must be done in a way that does not break anti-discrimination principles. Furthermore, the DO considered the consequences of the application of this practice to admissions to higher education institutions were still relatively unknown. However, in the opinion of the DO, even though preferential treatment should continue to be an option, the question remained as to which concrete measures needed to be taken in order to obtain balanced results (The European Directory of Women and ICT, 2010). Rather than amending the regulations, the Equality Ombudsman's Office considers that Swedish universities should be informed about which lawful measures they could use to promote gender balance in the student body (The European Directory of Women and ICT, 2010).

### 3.2. *The case of the Swedish University of Agricultural Sciences*

In 2007, a benchmark lawsuit took place in Sweden,<sup>1</sup> whereby women who had applied for the veterinary program of the Swedish University of Agricultural Sciences sued this university for unlawful gender discrimination. The Appeal Court's decision (Swedish Court of Appeal, 2009: T-3552-09) found positive action treatment when admitting students to the veterinary program to be contrary to both EU law and Swedish legislation at the time, namely, the Equal Treatment of Students at Universities Act (*European Network of Legal Experts in the field of Gender Equality, 2010: 133-134*). The veterinary program at the Swedish University of Agricultural Sciences (SLU) in Uppsala is the only veterinary school in Sweden. As there were many applicants for few places, and the number of applicants with top grades was higher than the number of seats, specific selection criteria were used when it came to their distribution. The university stipulated that, if two or several applicants had equal merits, the under-represented gender would be given priority in admission. In the selection system, a gender was considered to be under-represented if it made up less than 50 percent of the total number of eligible applicants, and female student applicants far outnumbered males for this particular degree (*European Network of Legal Experts in the field of Gender Equality, 2010: 133-134*). So, when applicants had equal merits, male students were given priority in accessing the program. The university gave instructions to the Swedish National Agency for Higher Education to implement this criteria of preferential

<sup>1</sup> Gunnar Strömmer and Clarence Crafoord were the lawyers that represented the women that sued this university. The *Centre for Justice* (<http://centrumforrattvisa.se/english/>) has taken legal action on behalf of women who have been denied admission to university degrees on the basis of their gender over the past years.

treatment. The reasons for this were mostly based on the consideration that both sexes should be represented in the labour market, as well as reasons connected to gender balance in the student body (*European Network of Legal Experts in the field of Gender Equality, 2010: 133-134*). This was considered to be a case of unlawful application of a quota system in the access to higher education, in order to promote gender balance. Even though the court accepted that a certain leeway for positive action should exist, it found preferential treatment in this case to be disproportionate. The university at stake had used a 'weighted lottery' in the admission process. Since the male applicants were the gender minority, they had a chance that was six times greater than the women of entering that particular veterinary degree and, in fact, as a result, solely men were admitted (The European Directory of Women and ICT, 2010). The procedure meant that there would be a rotation list of randomly selected male applicants and a list of randomly selected female applicants. The applicants who were first on the list were alternately raffled against each other for a place in the program. The draw gave men a chance to get the place, and this chance was ever greater in inverse proportion to the percentage of male applicants to the program. As the proportion of male applicants to the veterinary program in 2006 and 2007 was approximately 15 percent, men were therefore given a 85 percent chance of winning the draw against the female candidates. So, the outcome of this particular measure, in this year, was that many female students ended up on the reserve list for the degree in the above mentioned quota group. This fact was found to have such a disproportionate effect on the number of female applicants that, by making it virtually impossible for them to enter the veterinary program, it was considered to violate anti-discrimination legislation.

Section 7 of the Equal Treatment Act was at stake, due to the violation by the university of the prohibition of discrimination based on gender. It was proved in this case that the objective treatment of the female candidates resulted in a clear disadvantage for them. According to this Act, in order for this disadvantage to be considered, it is sufficient that an applicant has less of a chance to be accepted in a degree. Therefore, in order to suffer a disadvantage, a candidate did not necessarily need to be completely excluded. Moreover, the State Anti-Discrimination Committee considered that affirmative action in this case had not been justified. The women won the case and were awarded compensation on an individual basis, under the terms of section 13 of this Act (*European Network of Legal Experts in the field of Gender Equality, 2010: 133-134*). The treatment of female candidates was also considered to violate European Equal Treatment Directives, (Council Directive 76/207/EEC, 1976: 39; Council Directive 2000/78/EC, 2000: 20; Directive of the European Parliament and of the Council 2002/73/EC, 2002: 18) as well as the above mentioned Article 141, (4) of the EC Treaty.

### *3.3. Indirect discrimination of men in Sweden under European Union law*

The purpose of this section is to apply the considerations, approached on a regional level, regarding indirect discrimination on the grounds of sex under EU law, to the context of Sweden. Indirect discrimination is one of the key concepts in EU anti-discrimination law and it occurs where an unjustified adverse impact is produced for a protected class of

people by an apparently class-neutral action (Directive of the European Parliament and of the Council 2002/73/EC, 2002: 17, art. 2.2 [2]; Ellis, 2005: 91). Therefore, it is possible to draw a parallel with the current situation regarding men's access to higher education in Sweden, in the sense that the State decided to take away the gender element in the quota-systems for admission procedures. In other words, this decision, although it seems to be based on a gender neutral criterion, creates a particular disadvantage to men, as they are the under-represented sex in some higher education degrees in Sweden. Therefore, the alteration of the Higher Education Ordinance is class-neutral action only in appearance. As the gender imbalance is growing between men and women, this amendment will create an unjustified adverse impact on men. This decision by the government is not a class neutral action, as it discriminates the male gender as a class or group. The statistics presented in this thesis show that men are underachieving in some of the classical higher education degrees, not only in Sweden but also on a European level. So, the fact that Sweden took away this possibility of special protection for the under-represented sex can be considered to have created a situation of indirect discrimination for men.

Specifically regarding the concept of adverse impact, according to the case law of the ECJ, the developments of the Race Directive (Council Directive 2000/43/EC, 2000: 24) and of the Framework Directive (Council Directive 2000/78/EC, 2000: 20), it is relatively undisputed that it is enough for the adverse impact to be anticipated as a future or 'contingent harm' to a particular group, in order for it to be considered to occur (Ellis, 2005: 91-93). Hence, the idea of a future adverse impact is included in the concept of adverse impact itself. This concept is also applicable to the Swedish scenario, whether in the present or in the future, as the effects of gender imbalance are already occurring in the present, with men accessing degrees in lower numbers than in the past, and will continue to occur in the future due to the changes in the legislation, that have reduced the level of protection of this gender.

Specifically regarding the concept of 'contingent harm', according to the ECJ, statistical evidence must be presented as proof, in order to support the claim that a particular group is being the victim of an adverse impact emerging from a specific practice (Ellis, 2005: 94). Moreover, as a matter of principle, when a specific law determines that a certain situation is forbidden, it is not usually necessary to wait for actual harm to occur (Ellis, 2005: 94). This 'contingent harm' can be considered to occur within the Swedish context, in the sense that men are the particular group that has become the victim of the above mentioned adverse impact, that has emerged from a particular State practice. The State practice, in this case, was the decision to amend the Higher Education Ordinance, with the withdrawal of the gender element from the quota systems in the admissions procedures to higher education. The section of this thesis regarding gender equality in higher education on a European level, contains the statistical evidence that indicates this 'contingent harm'. Men as a social group are falling back in higher education in the European context, in which Sweden is included. However, in order to determine a situation of indirect discrimination in a court of law, to be able to claim that another group has received a more advantageous treatment, it has often been considered necessary to identify a group of people with whom to make a comparison (Ellis, 2005: 94). Thus, one can consider that, in the case of the

Swedish University of Agricultural Sciences, there was not enough reflection on the comparison between men and women regarding the application of the gender element to the quota system at stake. The only comparison that was made was between the disproportionate number of women who were left out due to the incorrect application of the quota system, and the men that were admitted to this degree, when they were 'under-qualified' in comparison with their female counterparts. The result was, in fact, one of gender imbalance, that tilted in the favour of men and left women out, even when they outnumbered men in terms of qualifications. Even though the decision ruled in favour of the discriminated women, it can also be considered that the issue of the indirect discrimination of men was disregarded, as the gender balance element was not taken into account for students of this gender.

Moreover, the fact that this situation occurred in this program and in other degrees in Swedish universities should not have influenced the decision of the State to withdraw the possibility of taking gender into account, regarding the application of quota systems per se. The outcome of these court cases for men was less protection than before the amendment of the Higher Education Ordinance.

Regarding the proof of the degree of actual adverse impact in sex discrimination claims, the ECJ has demanded it with different levels of precision (Ellis, 2005: 96). The different cases of indirect discrimination under EU law use different parameters in order to determine this concept. The criteria seems to be evolving in what concerns the demand for more detail and more specific statistical elements. For example, in some cases, in order for actual adverse impact to be considered, it is necessary that the measure affects a far greater number or percentage of people of one sex over another. Therefore, the proportion of members of a group of one sex that is affected by the measure must be particularly marked (Ellis, 2005: 94). However, the exact percentage or number of people affected varies on a 'case-by-case' level. In some cases, such as the *R versus Secretary of State for Employment* case (Case C- 167/97, 1999: ECR I-00623), it was considered necessary for the statistics to show that there was a considerably smaller percentage of one of the sexes that could comply with the rule in question (Ellis, 2005: 97). These concepts are still somewhat vague and abstract, as 'particularly marked' and 'considerably smaller percentage' are difficult to define. Moreover, in this case, the time of the creation and application of the rule in question was also taken into account, in accordance with the required percentage of gender balance. In order to consider that there was a case of indirect discrimination, it had to be established that a certain percentage of workers of a particular gender had not been attained in the job at stake. However, the ECJ does not limit itself to statistical evidence at a specific moment in time. Statistical evidence does not necessarily need to be 'marked', but can also be less evident, if it is considered to be persistent and constant over a long period of time (Case C-226/98, 2000: ECR I-02447). The ECJ leaves the discretionary power to draw conclusions and assess whether the statistics can be taken into account to the national court (eg, with regard to the significance of the phenomena at stake or the quantities of individuals involved in the groups in question) (Ellis, 2005: 97). In the *Swedish University of Agricultural Sciences* case, it seems that the decision of the court does not comply with the rules of EU law in the Swedish context, namely, with regard to statistical elements regarding

gender balance, where the concepts of adverse impact and contingent harm are concerned. It can be considered that the discretionary power that was left to the court in this case gave it too much leeway in the decision-making process, as the court seems to have disregarded any statistics that proved that the gender imbalance still existed. The ECJ also considered that, besides the relevance of the data at the moment when a certain act was adopted, the subsequent data contributing to the assessment of the impact of a certain measure on men and women may also be taken into account (Case C- 167/97, 1999: ECR I-00623). In what concerns the withdrawal of the gender element from the positive action measures of the Higher Education Ordinance, the statistics that prove the growing gender imbalance in higher education in Sweden and in other European countries may also be of relevance for the issue of the indirect discrimination of men.

The ECJ also raises the issue of the moment in time when the above mentioned adverse impact should be determined, that is also considered relevant in terms of proof. The Court has considered that the appropriate moment to judge the impact of a rule may vary according to the circumstances of each case (Case C- 167/97, 1999: ECR I-00623). For this purpose, EU law must be taken into account, whether the relevant time is the time of the adoption, the implementation or of the application of the national measure in the case in question. For this purpose, the legal and factual circumstances of the time when the legality of a certain rule is assessed (and consequently, the time of its impact) should also be left to the discretion of the national court. According to this line of thought of the ECJ, a parallel can be drawn regarding the actions of the Swedish State and the amendment of the Higher Education Ordinance. This amendment can be considered to not have been carried out at an 'appropriate moment', according to the Swedish national context (Case C- 167/97, 1999: ECR I-00623). Moreover, the time of the withdrawal of the gender element of this positive action measure may be questionable in terms of its legality, within the circumstances. The national authority that adopted it, the Swedish government, can be considered to have acted beyond its lawful powers. As a consequence, this amendment can be considered to not be in compliance with EU law, according to the above exposed case law and EU Directive guidelines. In conclusion, there are many grounds on which men can be considered to be indirectly discriminated in certain higher education admissions procedures in Sweden, not only according to the case law of the ECJ, but also according to EU Directives.

### *3.4. Sweden's 'opting-out' on a human rights level*

The purpose of this section is to apply the considerations of the United Nations on the right to education and gender equality to Sweden's approach to the human right to higher education, regarding quota systems for the under-represented sex. With this analogy in mind, some of the aspects that are considered by the UN will be applied to the Swedish context. Point 3.4.1. will look into the progressive realisation of the right to education, point 3.4.2. will consider the principle of non-discrimination on the grounds of sex in the right to education, while 3.4.3. will take on the issue of the violation of the human right to education. Finally, 3.4.4. will focus on the role of universities. This parallel to the current situation regarding the right to education and gender balance in Sweden serves the purpose of raising the issue of a potential violation of the right to education by the Swedish State.

### *3.4.1. On the progressive realisation of the right to education*

One of the elements that is considered to be included in the 'core content' of the right to education is the access to this right on a non-discriminatory basis (Wilson, 2005: 10). However, the Swedish government seems to have taken the 'opting out' route afforded to States through the use of the concept of the progressive realisation of the right to education. Even though the idea of realisation over time is considered to be a flexibility device, it imposes an obligation on States to move as fast and effectively as possible towards the full realisation of the rights in question. The Swedish government seems to have disregarded the concept of 'appropriate means', within the scope of the progressive realisation of the right to education, when it took away the legal possibility of quotas for the under-represented sex in the admissions procedures. From an International Human Rights perspective, 'Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means' [ICESCR, 1976: art. 13. 2. c)]. The 'means' which should be used to fulfil this obligation are "... 'all appropriate means, including particularly the adoption of legislative measures'." (CESCR, 1990: [3]). Given the established gender imbalance in certain higher education degrees, when the Swedish government amended the Higher Education Ordinance, excluding the possibility of taking gender balance into account as an element of appreciation in university admissions, it did not justify the 'appropriateness' of the elimination of this measure. The Swedish State was, in fact, free to decide for itself which means were most appropriate under these specific circumstances, but should have indicated why this specific positive action measure was withdrawn (CESCR, 1990: [4]). One can go as far as to consider this government decision a deliberately retrogressive measure, and therefore it should have been subjected to more careful consideration and full justification by reference to the totality of the rights provided for in the ICESCR (CESCR, 1999: [9]). It is deliberately retrogressive in the sense that it was adopted at a time where there was no strong justification to alter the protective measure in question. Men's right to higher education, as well as their right to non-discrimination on the grounds of sex are highly protected and, therefore, any legislative measures against these rights on a national level needed to be based on overriding and urgent circumstances under the terms of the ICESCR. However, Sweden has not assumed the burden of proving these circumstances, and therefore can be considered not to have complied with International Human Rights law (CESCR, 1999: [9]).

Women have been afforded quotas in politics (Krook, 2006: 110-118) as well as in university admissions procedures (Fullinwider, 2010: s 9), in several countries for years. More recently, the EU has launched a debate regarding seats for women in the administration boards of companies (EU Business, 2011), as well as in academia, in order to fight the gender imbalance among higher education professors and researchers (Numhauser-Henning, 2006: 11-22).

Nonetheless, the gender imbalance in many university degrees is still growing, leaving men out of the race to higher education. Whatever the explanations that may be put

forward regarding the situation of the underachievement of men on an academic level, there is an objective gender imbalance that needs to be tackled.

Moreover, the law did not fulfil the function to predict potential 'damage' nor did it attempt to prevent it. It also did not correct what was actually unlawful. Besides the damage that already existed with regard to men, the need to prevent greater gender imbalance as a consequence of these legal alterations was also ignored. Swedish law should still use the necessary measures (eg, quotas) in order to prevent the existing imbalances from getting worse, until the point in time where this society is able to correct the imbalance without the aid of this kind of positive action measure. Due to the fact that gender balance in higher education remains to be achieved in Swedish society, the law should not be changed, as it is depriving the under-represented sex of an extra measure of protection. So, the future of women as a social group in Sweden may also be compromised by this alteration, as this decision of the Swedish government to take away the gender balance element from higher education admissions may revert against them too. For instance, if the gender imbalance occurs on the female side in the future, there will be no extra protection for women either.

#### *3.4.2. On the principle of non-discrimination on the grounds of sex in the right to education*

Even though Sweden is bound by the general prohibition against discrimination on the grounds of sex in Article 2 (2) of the ICESCR, its government can be considered to have disregarded the interpretation made by the CESCR of the normative content of Article 13, in relation to the element of 'accessibility' to higher education (CESCR, 1999: [9]). As within the jurisdiction of the State educational institutions and programmes have to be accessible to everyone, without discrimination (CESCR, 1999: [6. b.] ), the elimination of gender quotas as a positive action measure can be considered to indirectly discriminate men, as a group, by limiting their chance to access higher education.

Non-discrimination should not only be based on the idea that education must be accessible to all, but also, in particular, to the most vulnerable groups of society, in law and fact. (CESCR, 1999: [32]). Moreover, the adoption of temporary special measures intended to create *de facto* equality for men and women (eg, quotas) is not considered to be a violation of the right to non-discrimination with regard to education. However, these temporary special measures are only allowed as long as they do not lead to the perpetuation of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved (CESCR, 1999: [32]). Furthermore, as has already been referred to above, the prohibition against discrimination is not to be subject to progressive realisation from an International Human Rights perspective, as it is to be considered as fully and immediately applicable to all aspects of education. If one applies this principle to the Swedish context, there is an objective disregard for this fact, as the principle of non-discrimination on the grounds of sex in education cannot be subject to progressive realisation. Therefore, it also cannot be submitted to a retrogressive measure of any kind, as these exist within the scope of progressive realisation. According to the data and statistics referred to in this thesis, *de facto* equality between men and women in the area of higher education is still far from

being achieved, not only at the level of the EU but also in Sweden. So, quotas as a positive action measure for reserving seats for men in certain university degrees in Sweden can be considered not only increasingly necessary but also justified.

In conclusion, as the prohibition against discrimination is not subject to progressive realisation, when the possibility of gender quotas for the under-represented sex in higher education was withdrawn in Sweden, men can be considered to have been victims of indirect discrimination. The fact that the Higher Education Ordinance was amended before the achievement of gender balance in certain higher education degrees, may be an indicator that men, as a group, have not been given equal treatment or opportunities to those of women, in what concerns affirmative action measures.

Furthermore, General Comment 28 specifically highlights measures of 'empowerment' for women, being quotas one of the 'strong measures' that can be considered to lead to this 'empowerment' in a faster and more direct manner. So, why are these measures not considered to have the same purpose in Sweden regarding men? It seems that the role of men in society is changing, and not enough attention has been given to what can be considered a social 'trend' that involves men's under-achievement in the 'classical' areas of academia (Numhauser-Henning, 2006: 11-22). So, besides being the victims of discrimination in their right to education on the grounds of sex, men are also being disregarded in Sweden if one applies the above concept of 'empowerment' to their social group, as they can no longer benefit from quotas, as a 'strong' positive action measure.

#### *3.4.3. On the failure to comply with the obligation to protect in higher education*

Within the framework of the right to education, the Swedish State can be considered to have violated its obligation to protect through the subjection of men to *de facto* discrimination. The *de facto* discrimination of men can be considered to be due to the State's failure to acknowledge and address discrimination, in the case of the withdrawal of the possibility for gender quotas in admissions procedures. This discrimination can be considered to take place on a societal level, regarding men's careers, due to the reduction of the horizons of young men in the access to higher education. Another reason for considering that men were the victims of *de facto* discrimination is the fact that the State failed to recognise and address the existence of obstacles to boys' academic achievement.

According to United Nations General Comment 3, a State's failure to meet the minimum core obligation of the 'progressive realisation' of ESCR would be a violation of its obligations under the respective Covenant (CESCR, 1990: [10]). The Limburg Principles (UN Commission on Human Rights, 1987) and the Maastricht guidelines (ICJ, 1997) can be applied to particular cases and violations. Taking the obligation to protect into specific consideration, it requires States to prevent violations of such rights by third parties (ICJ, 1997: [6]). Failure to perform this obligation constitutes a violation of the respective protected rights. Also, the Maastricht Guidelines recognize that economic, social and cultural rights impose obligations of conduct or result, and the right to education necessarily entails the obligation of 'result'.



In the case of Sweden, the application of quota systems for the under-represented sex in admissions procedures to university led to a result of gender imbalance. If one goes back to the case of the Swedish University of Agricultural Sciences, where women were left out of some higher education degrees, the failure to comply with the obligation of 'result' by the State is evident. From an International Human Rights perspective, with the application of that specific quota system, the university created exactly the opposite 'effect' to the desired gender balance among the candidates. The practical outcome of these measures led to the obvious discrimination of the sex that was not under-represented (women), while also failing to accomplish the objective of promoting gender balance for the under-represented sex (men). Moreover, within the scope of International Human Rights, certain groups, particularly those that are already vulnerable and underprivileged, are more likely to suffer disproportionate harm in this respect. These groups are considered to include, among others, women (ICJ, 1997: [20]). However, this principle should also be applied to men, who can also be considered a particularly vulnerable group in the Swedish context, due to the fact they are underachieving in different areas of education.

In the light of the Limburg principles and the Maastricht guidelines, a violation of the obligation to protect by the State in the area of the right to education will occur if 'The educational opportunities and facilities available to girls and women are inferior to those provided for boys and men.' (AAAS, 1998: [24]). This situation should also be applied when educational opportunities are made less available to boys. Thereby, the removal of the possibility of a gender quota in higher education can be seen as one less 'educational opportunity' for men as the under-represented sex, as it reduces their chance of access to certain university degrees.

So, the issue remains as to whether or not the Swedish government is, in fact, violating its obligation to protect, when taking away the possibility of seats for the under-represented sex. Is it not failing to address obstacles to boys' academic achievement? (AAAS, 1998: [24]). The CESCR Committee offers a short list of likely violations, which in many respects mirrors the core minimum elements of the right to education, whereas:

...violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address *de facto* educational discrimination;... the failure to maintain a transparent and effective system to monitor conformity with article 13(1); ... the failure to take 'deliberate, concrete and targeted' measures towards the progressive realisation of secondary, higher and fundamental education in accordance with article 13(2) (b)-(d). (CESR, 1999: [59]).

In conclusion, Sweden can be considered to be failing to comply with its international human rights obligations through these three types of violations. Firstly because, by amending the Higher Education Ordinance, the State introduced an alteration in the legislation that indirectly discriminates men in the field of education. Secondly, because the State failed to take measures which address the *de facto* discrimination of men. Men are, in practice, discriminated by the lack of action of the State in addressing the issue of their *de facto* discrimination in their access to higher education. This also means that Sweden is not effectively monitoring if everyone is being afforded the right to education. Finally, the

removal of the possibility of quotas as a positive action measure can also be considered a failure to take a targeted measure towards the progressive realisation of the right to higher education with regard to men, as quotas are a stronger type of positive action measure, unlike the "softer" goals regarding education.

#### *3.4.4. On the role of universities*

Do universities in Sweden have too much autonomy in the application of positive action measures? If this is the case, is this excessive autonomy in the application of quota systems by universities the reason for the results of gender imbalance upon their implementation? One possible solution would be that quota systems could be determined by the government, on a standard and uniform basis, for all universities, so that the application of gender quotas is not left in the hands of each higher education institution, on a 'case-by-case' basis.

Moreover, is there a possibility that, in the face of the several court cases regarding the discrimination of women in admissions procedures in Sweden, the sued universities decided to stop applying gender quotas due to political and social pressure? On the other hand, did the government's decision to amend the Higher Education Ordinance, with the elimination of the reference to gender when addressing positive action measures, also occur due to social pressure because of those very court cases?

The Limburg principles expressly lay down that States are accountable both to the international community and to their own people for their compliance with the obligations under the ICESCR (UN Commission on Human Rights, 1987: [10]). Ultimately, it is the Swedish State that has allowed for this excessive leeway in the implementation of quota systems by its universities, and therefore is the State that is to be held accountable for potential human rights violations that occur as a result of its government's decisions. According to these principles, even though a margin of discretion is afforded to States in the selection of means for complying with these obligations (UN Commission on Human Rights, 1987: [71]), a State will be in violation of the Covenant, *inter alia*, if, among other obligations, it fails to 'implement without delay a right which it is required by the Covenant to provide immediately' (UN Commission on Human Rights, 1987: [72]) or if 'it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant' (UN Commission on Human Rights, 1987: [72]) or 'it deliberately retards or halts the progressive realization of a right' (UN Commission on Human Rights, 1987: [72]). Considering the above, firstly, the Swedish State can be considered to have failed to implement 'without delay' men's right to education on a non discriminatory basis, as the Higher Education Ordinance was amended in a way that goes against the promotion of gender balance in admissions. Secondly, one can consider that, with the withdrawal of the possibility of the gender quotas, the State applied a limitation to men's right to education, for reasons not in accordance with the ICESCR. Moreover, this would involve a limitation to the equal rights of men to the enjoyment of the right to education set forth in Article 3 of the Covenant, as the alteration of the Ordinance goes against the obligation of the State to move as fast and effectively as possible in order to enable men's access to higher education. Thirdly, this amendment can also be seen as a means of stalling the progressive realisation

of men's right to education. If, in fact, this is the case, an issue regarding the separation of powers between the judicial, the legislative and the executive powers in Swedish democracy can also be raised. Was the motivation for the amendment of the Ordinance based on the fact that the sued Swedish universities did not apply the gender quota scheme with the aim of achieving the final result of gender balance? Women were, in fact, excluded from university in these cases, but this fact is not synonymous to the unlawfulness of the quota system itself. Therefore, there is no reason for the gender element of the positive action measure in question to be withdrawn from the Ordinance.

## Conclusion

Ultimately, this thesis has attempted to answer whether or not men are being discriminated from a legal and social perspective, where their educational opportunities are concerned. Therefore, behind this discrimination of men in the law, one may consider a previous underlying social issue. The trend for male underachievement on an academic level may be the result of the 'gendering' of boys in today's society. When focusing specifically on academic performance and achievement, it seems that culture plays a part in the stereotyping of the roles of men and women, as even empirical research into sex differences is often highly influenced by politics, and may be manipulated (Levit, 1998: 21-22). As gender does not exist outside culture, even the most simple connections between sex and academic performance are necessarily linked to social context. Moreover, culture attributes certain behaviours to certain genders and assigns values to those behaviours. According to some sociological studies, gender segregation is 'rampant' in schools, as it is indoctrinated by parents, teachers and peers (Levit, 1998: 44). Is it not society that expects boys to develop characteristics of dominance, such as independence, self-reliance, competitiveness and leadership? (Levit, 1998: 47)

Gender is, therefore, a largely social construct (Levit, 1998: 62-63). We live in a culture that not only celebrates differences but also looks for them, and biology easily becomes a perfect justification for discrimination (Levit, 1998: 63). Where gender differences are concerned, the fact that society constructs two separate gender cultures, that separates the sexes, disadvantages both females and males, and this fact needs to be strongly resisted, not only by means of the law, but also by all sectors of society (Levit, 1998: 15).

Female representation in many areas is considered crucial and necessary for a fair and equal society. Therefore, male representation in those same areas should also be seen to be necessary. There have been quotas for women in politics for years, and currently quotas for this gender are being proposed in administration boards on an EU level, as well as in academia. So, in the same way as a society with no female lawyers, doctors or scientists is considered imbalanced, the same should apply if there is a lack of men in these areas. Moreover, due to the developments in the law, there is no reason to wait for the gender imbalance between men and women in higher education to be aggravated further, in order to counteract it.

With regard to Sweden specifically, the adverse impact on men caused by the withdrawal of quotas for the under-represented sex in admissions to higher education will be progressively evident in the next few years. The gender element of positive action

measures such as quotas should therefore be reinstated into the Higher Education Ordinance, as well as the ethnicity element of the same provision. In this way, disadvantaged and vulnerable groups within the student population in Sweden will not be denied this opportunity for extra protection in the law. The problems regarding the discrimination of men and women in the application procedures would be solved by a correct and proportionate application of the quota systems by the respective universities. If there had been a greater degree of governmental control, those arbitrary results would have been avoided. In Swedish democracy, if the government is truly independent in its evaluation of the necessity for gender balance, then the need to change the Ordinance back to its previous, more protective version becomes evident. Under its human rights obligations, the government should also effectively monitor whether or not all students are being afforded their right to education.

So, is there not a 'special interest' that justifies quotas for gender balance in Sweden at the moment? Why are men's interests not considered sufficiently important for men to be afforded special protection in higher education? Is there, in fact, an issue of gender bias that is disregarding men as a vulnerable social group? In this case, men clearly have not been given equal treatment or the same opportunities as those of women, in what concerns affirmative action measures. It is also clear that the Swedish State is failing to recognise and address the obstacles to boys' academic achievement, as the removal of the possibility of a gender quota in higher education can be seen as one less 'educational opportunity' for men as the under-represented sex, that reduces their chance of access to certain university degrees.

Furthermore, quotas in admissions to higher education don't necessarily need to be in a 50 percent proportion for each sex. They can be proportional to the population that attempts to access the respective degrees instead. In this way, true balance between the genders would be reflected in student numbers and, hopefully, in the labour market. If International Human Rights law, European law and Swedish law all consider gender balance in labour and education important when women are the under-represented sex, then these legal systems should give the same importance to gender balance, when the under-represented sex is men, at the risk of their discrimination, on a direct and indirect level.

On the other hand, a State can decide for itself what is the most appropriate way of achieving gender balance. It is not forever bound by a previous decision to allow preferential treatment. In fact, a State has discretionary power to act in this area, but there are guidelines given on an International Human Rights level and on an EU regional level that should bind States not to withdraw protective measures for the under-represented sex before gender balance has been attained.

Sweden chose well in applying quotas as a positive action measure, but the application led to negative results. Moreover, the government must not base its decisions to amend laws such as the Higher Education Ordinance on court case results that tend to influence public opinion. All the public powers seem to be 'singing the same song', which sounds like lack of independence in a democratic society. The fact that the law was changed in Sweden in the sequence of the court cases regarding ethnic quotas and gender quotas, respectively, shows that there may be a lack of independence among the democratic powers

in Swedish society, namely, between the executive, the legislative and the judiciary. Regarding universities, the fact that they are subject to political pressure raises the issue of their autonomy towards implementing government policies. On the other hand, the excessive leeway given by the government to the universities may also be questionable, in the sense that the 'case-by-case' application of quota systems led to gender discrimination of both men and women. So, the excessive autonomy given to the universities by the government may be considered to be contrary to human rights. Therefore, the government should be held accountable for its actions.

It is true that quotas are not the ideal positive action measure, as they are the most 'aggressive' form of creating equal opportunities, and can be seen to be an artificial way of providing gender equality. There is also a danger of creating a nightmare social scenario where there are quotas for every single group in society. Moreover, from the perspective of individual rights, every time you give a seat to someone due to a quota, you can be considered to be taking away this possibility from someone else, discriminating the person that was left out because of their gender, ethnicity or other factors in the process. Nevertheless, Sweden would better fulfil its international obligations if it did not regress on positive action measures that were pioneering, not only on a European level, but also on a human rights level, as it stands as a country which is notable for its democratic and egalitarian society.

In conclusion, as discrimination on the grounds of sex will not cease to exist in the near future, both men and women would benefit if quotas for the under-represented sex are maintained, not only within the Swedish context, but also at the level of European Union Law and International Human Rights law.

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<http://www.internationalconstitutionallaw.net/download/04612d7e7dcb2cbdbe051d5321fa4b53/Barradas.pdf>

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